

**Senator Todd Weiler** proposes the following substitute bill:

**PRIVATE SCHOOL LIABILITY PROTECTIONS**

2018 GENERAL SESSION

STATE OF UTAH

**Chief Sponsor: Todd Weiler**

House Sponsor: Timothy D. Hawkes

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**LONG TITLE**

**General Description:**

This bill addresses a nonprofit private school's liability.

**Highlighted Provisions:**

This bill:

- ▶ provides legislative findings;
- ▶ defines terms;
- ▶ limits judgments for negligence claims of physical injury on a nonprofit private school's school related property and requires insurance;
- ▶ prohibits punitive or exemplary damages;
- ▶ establishes scope of section; and
- ▶ addresses application of workers' compensation.

**Money Appropriated in this Bill:**

None

**Other Special Clauses:**

None

**Utah Code Sections Affected:**

ENACTS:

**78B-4-516**, Utah Code Annotated 1953



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*Be it enacted by the Legislature of the state of Utah:*

Section 1. Section **78B-4-516** is enacted to read:

**78B-4-516. Nonprofit private school immunity.**

(1) The Legislature finds the following:

(a) Nonprofit private schools serve the same functions as public schools and provide important benefits to their communities, including open and park spaces and community meeting spaces. By allowing members of the community to use the nonprofit private schools' premises and facilities it exposes the nonprofit private schools to risk of potential lawsuits and legal claims.

(b) Nonprofit private schools educate children who would otherwise be educated at the expense of the state and save the state education system a substantial amount of money. The state has an interest in ensuring the viability of nonprofit private schools, which offer educational options, spur innovation, and educate thousands of students who would otherwise use the public school system.

(c) While public schools benefit from protections under Title 63G, Chapter 7, Governmental Immunity Act of Utah, nonprofit private schools, which serve almost identical functions, have no such legal protections. In recognition of the economic and other substantial benefits that nonprofit private schools provide to the state and their communities, it is appropriate to cap damages for simple negligence for physical injuries happening on nonprofit private schools' property and to prohibit punitive or exemplary damages.

(2) As used in this section:

(a) "Nonprofit private school" means a nonprofit school that:

(i) provides elementary educational services, secondary educational services, or both;

(ii) is not part of the public education system; and

(iii) is eligible for federal special education benefits under 20 U.S.C. Sec. 1412(a)(10).

(b) "Physical injury" means harm to the body of an individual.

(c) "School related property" means property within the boundaries of a nonprofit private school, including a facility used by the nonprofit private school for school purposes.

(3) (a) In an action against a nonprofit private school for physical injury to an individual arising out of or related to the injured individual's presence on school related

57 property:

58 (i) if the nonprofit private school maintains insurance that at a minimum covers  
59 physical injury caused by negligence of the nonprofit private school at levels sufficient to cover  
60 the limitations of judgments established under this Subsection (3), a court may not award a  
61 judgment of more than \$583,900 for injury to one individual or \$2,000,000 in total for injuries  
62 from a single incident only; and

63 (ii) a court may not award punitive or exemplary damages.

64 (b) The limitations of judgments and insurance established under Subsection (3)(a)(i)  
65 shall increase July 1 of each even-numbered year to be the same amount as similar limits on  
66 judgments against a government entity established by the state risk manager by rule under  
67 Section [63G-7-605](#).

68 (4) This section does not apply to an action against a nonprofit private school for  
69 physical injury intentionally caused by the nonprofit private school or resulting from gross  
70 negligence by the nonprofit private school.

71 (5) This section does not modify the application of Title 34A, Chapter 2, Workers'  
72 Compensation Act, or Title 34A, Chapter 3, Utah Occupational Disease Act, to physical injury  
73 to an employee.

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### Legislative Review Note

The Utah Legislature's Joint Rule 4-2-402 requires legislative general counsel to place a legislative review note on legislation. The Legislative Management Committee has further directed legislative general counsel to include legal analysis in the legislative review note only if legislative general counsel determines there is a high probability that a court would declare the legislation to be unconstitutional under the Utah Constitution, the United States Constitution, or both. As explained in the legal analysis below, legislative general counsel has determined, based on applicable state and federal constitutional language and current interpretations of that language in state and federal court case law, that this legislation has a high probability of being declared unconstitutional by a court.

This bill imposes caps on a nonprofit private school's liability for physical injury caused by negligence on a nonprofit private school's property and prohibits punitive or exemplary damages. These provisions raise constitutional issues including Utah Constitution, Article 1, Section 11, which is called the "open courts provision," that prohibits the Legislature from abrogating a cause of action under certain circumstances. See Waite v. Utah Labor Comm'n, 2017 UT 86, ¶ 19. For a plaintiff to prevail in an open courts challenge, the plaintiff must

demonstrate that the legislation abrogates a legal remedy, and does so: (1) without providing an effective and reasonable alternative remedy; or (2) without eliminating a clear social or economic evil. Id. (quoting the "Berry test," Berry ex rel. v. Beech Aircraft Corp., 717 P.2d 670, 680 (Utah 1985)). In the case of this bill, there is no alternative remedy provided. The requirement that the nonprofit private school carries insurance does not provide an alternative remedy to recover for liability because the caps established in the bill would still limit some plaintiffs' ability to recover fully for their injuries. Therefore, it falls under the second prong of eliminating a clear social or economic evil. If the reviewing court finds that the legislation eliminates a clear social or economic evil, it must also find that the elimination of an existing legal remedy is not an arbitrary or unreasonable means for achieving that objective. Id. The Utah Supreme Court has granted deference to the Legislature, explaining that "[w]hen an issue is fairly debatable, we cannot say that the legislature overstepped its constitutional bounds when it determined that there was a crisis needing a remedy." Id. at ¶¶ 22-24 (citations omitted)

Types of social or economic evils rejected by the court include generalized "concern about increased damages awards against governmental entities" operating electrical systems, Laney v. Fairview City, 2002 UT 79, ¶ 66, 57 P.3d 1007; and "a rash of frivolous lawsuits in California . . . but not particularly in Utah," see Day v. State, 980 P.2d 1171, 1186 (Utah 1999). Types of social or economic evils recognized by the courts include encouraging medical professionals to render aid in emergency situations, see Hirpa v. IHC Hosps., Inc., 948 P.2d 785, 793 (Utah 1997); and stemming overwhelming medical care costs, see Judd v. Drezga, 2004 UT 91, ¶ 15, 103 P.3d 135 (upholding a cap on limited quality of life damages but distinguishing the cap from a "cap [on] all damages, like the cap struck down in Condemarin."). In Condemarin v. University Hosp., 775 P.2d 348 (1989), the Utah Supreme Court struck down a cap on damages, finding that the right to recover from personal injuries is an important substantive right. Id. at 361-64 As part of a due process analysis, the court found that a legislative attempt to protect the state treasury was not a justifiable reason to impose caps on those most in need of financial protections. Id. This bill affects the state's treasury, if at all, only indirectly: instead, the bill directly affects the coffers of a nonprofit private school.

The social and economic evil argued for this bill is that, if a nonprofit private school is frequently held liable for physical injury or if there is a catastrophic accident, the nonprofit private school could close, which would create a hardship for the public school system absorbing the impact of the students who could no longer attend private school and would lead to the loss of important benefits to communities such as open and park spaces. There is a high probability that a court would reject this argument and find that the Legislature is not responding to a social or economic evil because it has not alleged any evidence of actual costs or of an existing crisis needing a remedy; rather, the Legislature has alleged concern for the possibility that nonprofit private schools will be frequently liable for negligence, or will face a catastrophic accident. Although the courts defer to the Legislature when the Legislature determines that a crisis needs a remedy, this legislation is not "fairly debatable" in the absence of an existing crisis needing a remedy. Assuming a court continues to follow Berry precedent, there is a high probability that the court would find the proposed legislation unconstitutional.

**Office of Legislative Research and General Counsel**